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CRIMINAL

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY
CLERK, CIRCUIT COURT
FAIRFAX, VA

COMMONWEALTH OF VIRGINIA)

v.)

CRIMINAL NO. 102888

LEE BOYD MALVO)

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

I. Malvo's Interview with Montgomery County Detective Ryan was Ambiguous and the Commonwealth will not Introduce that Evidence at Trial

Upon his arrest on October 24, 2002 as a material witness under 18 U.S.C. § 3144, Lee Boyd Malvo (Malvo) was brought to a Family Services Division building in Rockville Maryland where Detective Terry Ryan (Ryan) of the Montgomery County Police Department attempted to process and interview him. Throughout this encounter, Malvo declined to verbalize his responses to Ryan's questions. Instead, Malvo employed a variety of non-verbal communications including pantomime, hand and facial gestures, and tracing figures on the table top with his fingers. In light of the ambiguity created by Malvo's chosen methods of communication with Ryan, the Commonwealth will not seek to offer Malvo's responses into evidence. Therefore, Malvo's Motion to Suppress with regard to Detective Ryan's interview is moot.

II Malvo's Conversations with Jail Guards did not Obligate them to Re-Mirandize him

A defendant must be advised of his Miranda rights only when he is faced with (1) custodial (2) interrogation (3) initiated by (4) law enforcement officers. Miranda v. Arizona, 384

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U.S. 436 (1966). If any of the prerequisites necessary to trigger the Miranda doctrine are absent, a suspect is not entitled to the Miranda warnings. In this case, none of the prerequisites set forth in the Miranda opinion were present and therefore Malvo was not entitled to be re-advised of the Miranda warnings.

At the time Malvo conversed with the jail guards he was not in custody for Miranda purposes. To be sure, Malvo was being held in jail on a material witness warrant when he began speaking to jail guards on October 25, 2002. But a prisoner is not automatically in "custody" for Miranda purposes merely because of his status as a prisoner. See Blaine v. Commonwealth, 7 Va. App. 10, 14 (1988). The proper inquiry is whether Malvo's freedom of action at the time of his statements was "altered or further restricted." Beamon v. Commonwealth, 222 Va. 707, 710 (1981); see also United States v. Conley, 779 F.2d. 970, 973 (4th Cir. 1985) ("custody" or "restriction" in the prison context "necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement"); United States v. Cooper, 800 F.2d. 412, 414 (4th Cir. 1986) (same holding) quoting Cervantes v. Walker, 589 F.2d. 424, 428 (9th Cir. 1978). In both instances the un rebutted evidence will be that Malvo made the challenged statements while he was inside his cell speaking through his window. His physical circumstances were never altered at any point before, during or after the conversations. In short, the record in this case is devoid of any of the factors which would create a custodial situation as described in Blaine, Beamon, Conley, Cooper, and Cervantes.

The conversations between Malvo and the jail guards were not initiated by the guards and did not constitute interrogation. Corporal Wayne Davis's (Davis) comment to Malvo, "don't even think about it" was prompted by Malvo's apparent inspection of the ceiling. Malvo had attempted to escape though the ceiling in Rockville the day before, a fact widely reported in the

media. Malvo's retort "you read too many newspapers" demonstrated that Malvo understood the nature of Davis's concern. This exchange did not require a readvisement of the Miranda warnings because it concerned routine matters of prison security. It was not interrogation. When Captain Joseph Stracke (Stracke) entered the room, Malvo initiated communications with Stracke by gesturing at him. Upon further inquiry Malvo eventually verbalized a desire for some of Davis's fish (an item which was not available to inmates). After receiving the fish Malvo then blurted that he "always fasted before his missions." Stracke then asked Malvo what he meant by that. Thus began a conversation between Stracke and Malvo, a conversation initiated by Malvo on a topic chosen by Malvo. See generally, Miranda, 384 U.S. at 478 ("Any statement given freely and voluntarily without any compelling influence is of course admissible in evidence... Volunteered statements of any kind are not barred by the Fifth Amendment") cited in Clodfelter v. Commonwealth, 218 Va. 98, 104-105 (1977) (even where arrested, defendant invokes right to counsel he may subsequently volunteer information to detectives); Owens v. Commonwealth, 218 Va. 69, 73 (1977) ("The fundamental import of the Fifth Amendment privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel but whether he can be interrogated"). Malvo's statements to Stracke were not the result of any psychological pressures or interrogative techniques. Waye v. Commonwealth, 219 Va. 683 (1979) (law enforcement officers may ask questions to clarify and expand upon a volunteered statement without violating the Fifth Amendment).

The jail guards, Stracke and Davis, were not law enforcement officers. Both Stracke and Davis were employees of the Maryland Division of Corrections. Their sole responsibility was to ensure the security of prisoners at the jail. They did not have any powers of law enforcement or

arrest in Maryland. It was not their function to investigate criminal cases. Neither Davis nor Stracke was trained in interrogation tactics. They were not encouraged to speak to Malvo by anyone inside or out of any law enforcement agency. Their only knowledge of Malvo and these crimes came from the news media. As the Virginia Court of Appeals has explained in Mier v. Commonwealth, 12 Va. App. 827 (1991)

“the duty of giving Miranda warnings is limited to employees of governmental agencies whose function is to enforce the law, or to those acting for such law enforcement agencies by direction of the agencies; ... it does not include private citizens not directed or controlled by a law enforcement agency even though their efforts might aid law enforcement.”

Id at 830, citing State v. Bolan, 27 Ohio St. 2d 15, 18 (1971) (merchant’s employee need not give Miranda warning to shoplifter). Although, the Bolan case involved a private employee, the opinion went on to acknowledge the universal applicability of the analysis noting that “a similar conclusion was reached in People v. Wright... even though the security guard was employed by a governmental agency, a county hospital.” Bolan, 27 Ohio St.2d at 19, citing People v. Wright, 249 Cal. App. 2d 692 (1967)

III. Malvo’s Sixth Amendment Rights were not Violated in this Case

As this Court had already found, Malvo was not charged in the instant case until November 8, 2002. See Letter Opinion dated May 6, 2002 at p. 9. The right to counsel under the Sixth Amendment is offense specific. Texas v. Cobb, 532 U.S. 162, 173 (2001); McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). As a matter of law, Malvo’s Sixth Amendment rights with respect to the instant charges could not have attached until formal adversarial proceedings had begun. The Sixth Amendment right to counsel attaches “after a formal accusation has been made... and a person who has previously been just a ‘suspect’ has become an ‘accused’ within

the meaning of the Sixth Amendment.” Michigan v. Jackson, 475 U.S. 625, 632 (1986); Letter Opinion dated May 6, 2003 at p. 9.

Finally, while Malvo suggests in his brief that he asserted his right to counsel before Magistrate Judge Bredar, the record reveals that he did not. Instead, Malvo remained mute throughout his initial appearance in Maryland.

IV. Conclusion

The Miranda decision was never intended to apply to the factual situation presented to the Court in this case. The Miranda decision actually addressed four distinct cases involving interrogations by two police officers, a detective and a prosecutor. All of these interrogators were actively amassing evidence against their respective suspects with an eye towards prosecution. All were trained interrogators who employed “menacing police interrogation procedures” against these suspects. Miranda, 384 U.S. at 457. All these law enforcement agents possessed investigative knowledge of the case and had, as a part of their employment, a duty to investigate and prosecute their respective cases. They were, for all intents and purposes, the accusers of these suspects. In Miranda, the court reasoned that “the entire thrust of police interrogation....in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rationale judgment.” Miranda, 384 U.S. at 465.

In stark contrast to the situations confronting the suspects in the Miranda case, Malvo was not “confronted by his accusers” when he made an independent decision to speak to the jail guards. Stracke and Davis had no more knowledge of, or involvement in, the prosecution of Malvo than any private citizen. Neither guard approached Malvo armed with any knowledge of the investigative evidence against him and thus they could exert no pressure upon him in that respect. They were both wholly untrained in the tactics of interrogation. They did not employ

any psychological ploys or exert any pressure upon Malvo whatsoever. Their duty was not to investigate Malvo but only to keep him safe and secure. At any time Malvo could have walked away from the window in his cell or simply maintained his silence. Malvo undoubtedly lowered his guard and began speaking for many reasons. One reason may well be that he correctly perceived that his guards were not part of any criminal investigation. But as the content of his statements to the guards reveals, he was relaxed and calm as he related his past criminal activities. His demeanor with the guards was that of one who was proud of his accomplishments and comfortable with the brutal aftermath of his handiwork. Malvo's statements to jail guards sprang not from any in-custody police initiated interrogation, but rather from Malvo's own pride in the horrors inflicted upon his innocent victims. Therefore, his Motion to Suppress should be denied.

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RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

JOHN R. MURPHY
Senior Assistant Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Defendant's Motion to Suppress was mailed, postage prepaid, to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151, and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221, this 17th day of July, 2003.

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RAYMOND F. MORROGH
Deputy Commonwealth's Attorney